

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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APR 11 1991

In re Application of)
BENCHMARK COMMUNICATIONS CORPORATION)
For Construction Permit for a New)
FM Station to Operate on Channel 291C3)
in Chatom, Alabama)

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY
File No. BPH-891228MT

TO: Roy J. Stewart, Chief
Mass Media Bureau

PETITION TO DENY

1. Charles Esposito d/b/a Hap-Hazard Broadcasting ("Hap-Hazard") hereby petitions to deny the above-captioned application of Benchmark Communications Corporation ("Benchmark"). As set forth in detail below, it is far from clear that Benchmark's application was properly filed in response to the applicable "window" listing; Hap-Hazard submits that it was not properly filed and should therefore be summarily dismissed. But even if Benchmark's application was properly filed, Benchmark has elected not to fully disclose therein information which raises serious questions both as to Benchmark's truth and candor before the Commission, and as to its willingness and ability actually to construct the station which it has applied for. Moreover, Benchmark's less than candid manner of addressing that information in its application underscores Benchmark's clear unreliability. Its application cannot be granted without full consideration of all of those questions. Accordingly, Benchmark's application should be denied or, at a minimum, designated for hearing with respect to the serious

questions described below.

2. Benchmark's application appeared on a Public Notice, Report No. NA-143, Mimeo No. 12095, released March 11, 1991, which specified a cut-off date of April 12, 1991 for petitions to deny. Accordingly, the instant petition is timely.

3. Hap-Hazard is an applicant (File No. ARN-900314MM) for Channel 291 in Chatom.^{1/} As such Hap-Hazard is clearly an interested party with standing to challenge Benchmark's application.

Background

4. The history of the Chatom channel has not been uncomplicated. Originally that channel was a Class A channel. A permit to construct and operate on that channel was granted to June G. Fuss in October, 1984, with an initial expiration date of October, 1985. Ms. Fuss subsequently sold the permit to Benchmark in mid-1985 without apparently having undertaken any construction. Between September, 1985 and March, 1988, Benchmark filed at least three applications for extension of its permit. Its final extension application -- File No. BMPH-880325JC -- was denied by letter of Larry Eads, Chief, Audio Services Division, dated January 19, 1989. A copy of that letter is included as Attachment A hereto.

^{1/} Hap-Hazard understood that no acceptable applications for the Chatom channel had been filed as of the close of the applicable window period. Accordingly, pursuant to the Commission's "first-come-first-served" rules, Hap-Hazard prepared and filed its application. That application has not been dismissed or returned, and Hap-Hazard understood that it was being duly processed by the Commission's staff.

5. As reflected in the January 19, 1989 letter, the Commission's staff found that Benchmark had made "literally no progress" in constructing its station. Moreover, as discussed in greater detail below, the Commission's staff also stated that

there appear to be several misrepresentations with respect to construction progress made by Benchmark in this case. Specifically, while Benchmark claimed in its March 25 application that tower and mobile home to be used for studios and offices were on site with equipment installation progressing, these statements appear to be untrue. There is still no tower at the site, and no trailer arrived at least until (by Benchmark's own admission) May 16, 1988. Additionally, Benchmark claimed that the power company had begun installing a service line to the site, when no such line is in place yet, over nine months after the claim was made. We remind Benchmark that truthfulness is a key element of character necessary to operate a broadcast Station in the public interest. [citations omitted] However, given the denial of the subject extension application and consequent cancellation of the WCCJ(FM) construction permit, we do not believe that further action is warranted at this time.

See Attachment A, page 4. Benchmark sought reconsideration of the denial of its extension application.

6. Meanwhile, in 1986 Benchmark had proposed that the Class A channel in Chatom be upgraded to Class C2 status. See MM Docket No. 86-55. That proposal was not acted on until October 16, 1989, months after Benchmark's permit had been cancelled. In the Report and Order terminating MM Docket No. 86-55, 4 FCC Rcd 7556 (1989), the Commission rejected Benchmark's proposal because, as a result of the cancellation of its permit, Benchmark was "no longer eligible to request modification of" that permit (although Benchmark did advise the Commission of "its willingness to apply for a Channel 291C3 allotment at Chatom as a 'new facility'"). Report and Order in MM Docket No. 86-55, 4 FCC

Rcd at 7556, ¶4. In that same Report and Order the Commission also upgraded the Chatom channel allotment to Class C3 status. Applications for the newly-upgraded Chatom channel were due to be filed by January 2, 1990.

7. On December 28, 1989, Benchmark tendered an application for modification of the construction permit which had been cancelled eleven months earlier. In that application Benchmark did indeed refer to its earlier extension applications. However, Benchmark elected not to acknowledge that the Commission's staff had concluded that "there appear to [have] be[en] several misrepresentations with respect to construction progress made by Benchmark". Rather, Benchmark described its previous difficulties only as follows in an exhibit entitled "Broadcast Interests":

Unable to complete construction before its last permit expired, Benchmark filed for an extension to its construction permit in a timely manner. However, certain events that were to have taken place between the time the application was prepared and filed and the expiration of the construction permit failed to materialize. . . . [It was alleged] that a misrepresentation had occurred when Benchmark indicated that events reported in its application for additional time had taken place when they had not. Benchmark believed these events would be completed by the end of the existing construction period. When they did not occur, Benchmark immediately amended the application and stated the nature of the discrepancies and the steps it took to correct them. Without reaching the allegations of misrepresentation, the Commission denied the extension application for lack of adequate construction progress.

See Benchmark Application (File No. BPH-891228MT), Exhibit I.

Discussion

8. As a threshold matter, it is clear that Benchmark's application could not properly have been accepted as one for modification of its construction permit. That permit had been cancelled almost one year before Benchmark's application was filed. Perhaps even more damning, Benchmark had effectively acknowledged the inappropriateness of any modification application when, in Joint Supplemental Comments filed with the Commission in June, 1989 in MM Docket No. 86-55, it stated its willingness to apply for Channel 291C3 as a "new facility". See 4 FCC Rcd at 7556, ¶4. In view of the fact that Benchmark clearly recognized that a modification application could not be accepted, its voluntary choice to proceed with precisely such an application clearly supports dismissal of the application.

9. Hap-Hazard recognizes that, on the first page of its application, Benchmark attempted to straddle the fence by inserting the following language:

Should pending File No. BMPH-880325JC [i.e., Benchmark's 1988 extension application which had been denied almost a year earlier] not be granted, applicant requests that this be treated as an application for a new station.

But that language, which Benchmark presumably hoped would entitle it to the best of both worlds, in fact achieved precisely the opposite. By Benchmark's own terms, its application was not to be deemed to have been for a new station unless its March, 1988 extension application were to be denied. Since, at the time its December, 1989 application was filed, Benchmark had pending a petition for reconsideration of that denial, the "condition" to

which Benchmark elected to make its application subject was not satisfied. More importantly, that condition was not satisfied prior to January 2, 1990, the last day of the window filing period for the Chatom channel. Thus, Benchmark cannot be said to have filed a valid application in the applicable window period.

10. Of course, if Benchmark had simply dismissed its then-pending petition for reconsideration on or before December 28, 1989, its application would arguably have been acceptable as one for a new station since, under those circumstances, it would have been filed within the window period and it would not have been subject to any contingencies occurring after the close of the window period. But Benchmark chose to engage in gamesmanship apparently designed to permit it to block competition if the denial of its extension application were to be reconsidered, while still attempting to assure itself of consideration if reconsideration were denied. ^{2/}

11. Under the circumstances, Benchmark should not be permitted to benefit from its subterfuge. If Benchmark had wanted to file a "new application", it could certainly have done

^{2/} It is clear that such gamesmanship was Benchmark's intent: in June, 1990, Benchmark dismissed its petition for reconsideration, asserting that its December, 1989 application could be granted as the only application filed during the window period. But Benchmark's self-serving claim contradicted the established facts: by its own terms, Benchmark's application could not be deemed to be an application for a new facility unless and until Benchmark's petition for reconsideration was dismissed or denied; but that petition was not dismissed until June, 1990, several months after Hap-Hazard's application was filed. That is, by the time the prevailing circumstances permitted Benchmark's application to be treated as a new application, the window for such applications had long closed and Benchmark's application was, at best, third in line.

so. However, it chose not to, and it must now suffer the consequences of its choice: its application sought modification of a construction permit which had been cancelled and which was never reinstated; as such, that application was obviously unacceptable for filing and should be summarily dismissed.

12. But even if Benchmark's application were to be considered by the Bureau, it is clear that that application cannot and should not be granted. Benchmark has already had a five-year opportunity to construct and operate a new FM station in Chatom. It failed to take advantage of that opportunity. Worse, it engaged in a series of misrepresentations to the Commission in an effort to cover up its failure to construct. ^{3/}

^{3/} The record compiled in connection with Benchmark's March, 1988 extension application and subsequent related filings speaks for itself. That record includes the following:

- Benchmark stated in its March, 1988 application, that excavation for the tower foundation had commenced and "anchors and tie down points" for a mobile trailer had been completed as of early February, 1988. In fact, however, the "excavation" consisted of a single two-by-six-foot hole dug allegedly dug by hand by one of Benchmark's principals and the "anchors and tie down points" were merely four wooden pegs driven into the ground to indicate where the anchors were to be placed.
- Benchmark stated in its March, 1988 application that a mobile home had already been delivered to the site and equipment was being installed therein. In fact, no mobile home was delivered to the site until May, 1988.
- Benchmark stated in its March, 1988 application that its tower was delivered to the site on March 1 and that erection would commence on March 23. In fact, Benchmark's original tower was not to be delivered until March 8 and, when it was delivered, delivery was refused on March 21. As of January, 1989, no further tower had been erected (or even delivered, for that matter).

(continued...)

Mere review of the Commission's January, 1989 letter establishes at least that much. And Benchmark's December, 1989 application aggravates those misrepresentations. Far from providing an objective, even quasi-detailed summary of the allegations and the Commission's response, Benchmark provided (at most) only a vague, cursory and misleading summary. Playing fast and loose with the truth, Benchmark boldly asserts that the Commission denied its extension application "without reaching the allegations of misrepresentation".

13. Of course, as is blatantly obvious from the face of the Commission's January 19, 1989 letter, the Commission in fact found that "there appear[ed] to be several misrepresentations with respect to construction progress by Benchmark". While that may not reach the technical level of a formal finding of misrepresentation, it is clear that the allegations of misrepresentation were considered by the Bureau and at least tentatively disposed of adversely to Benchmark. In light of the undeniable truth, Benchmark's misleading choice of

^{3/}(...continued)

- Benchmark stated in its March, 1988 application that the local power company had begun installing a service line to the site, with installation likely to be completed by the end of March, 1988. In fact, Benchmark did not reach a utility easement agreement with the power company until July, 1988. Since such an agreement (and related payment of a \$650 fee) was essential to commencement of installation of power, no installation had theretofore occurred. In fact, as of January, 1989, no power lines had been laid.

While other instances of Benchmark's overwhelming lack of candor appear in its various submissions, these alone should be sufficient to demonstrate Benchmark's fundamental lack of qualifications.

language in its December, 1989 application reinforces the unmistakable perception that Benchmark has not been, and continues not to be, truthful and candid with the Commission. Under these circumstances, its application cannot be granted. ^{4/}

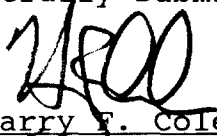
14. Thus, what the Commission presently has before it in Benchmark is an applicant with a demonstrated (and apparently continuing) tendency to misrepresent or lack candor. Moreover, it is an applicant which has already wasted a six-year opportunity to build the station which it now claims it wants to build. The Commission should not waste its scarce time and resources giving applicants such as Benchmark a fifth chance to do what it has thus far chosen not to do. This is especially true where Hap-Hazard, a diligent applicant eager for the opportunity to operate the Chatom station, is available with an application pending before the Commission. In recent years the

^{4/} The best that Benchmark might hope for would be that its application might be designated for hearing on one or more misrepresentation/lack of candor issues. In view of Benchmark's own admissions in connection with its March, 1988 extension application, it is not at all clear that a hearing would be necessary: Benchmark has clearly and repeatedly acknowledged that statements it has made to the Commission were false. Thus, summary dismissal without hearing appears to be appropriate.

Such an approach would be especially appropriate here since it would obviate the need for the addition and trial of still more serious issues. For example, Benchmark has indicated to the Commission that its financial qualifications are based in significant part on the value of equipment Benchmark supposedly has on hand. However, in view of Benchmark's representations relative to its March, 1988 extension application, it is not at all clear that Benchmark's claims concerning the availability of any particular piece of equipment can be relied upon. This is especially so in view of the fact that, in September, 1990, Benchmark amended its technical proposal in a way virtually guaranteed to increase its equipment needs (e.g., by proposing a directional antenna system and higher power); despite this, Benchmark chose not to amend its financial showing.

Commission has emphasized repeatedly that the public interest is disserved when Commission resources are wasted "temporizing with flawed proposals". E.g., Chudy Broadcasting Corp., 58 R.R.2d 133, 134, n.7 (1985); Hillebrand Broadcasting, Inc., 1 FCC Rcd 419, ¶¶2-3 (1986); Warren Price Communications, Inc., 2 FCC Rcd 7409 (Rev. Bd. 1988), rev. denied, 4 FCC Rcd 1992 (1989), recon. denied, 5 FCC Rcd 2906 (1990); CSJ Investments, Inc., 5 FCC Rcd 7653, 7654, ¶8 (1990); Carol Sue Bowen, 6 FCC Rcd 10 (Rev. Bd. 1990); Victorson Group, Inc., FCC 91R-26, released March 28, 1991 (Rev. Bd.) at n.3. If, as the Commission has repeatedly indicated in these and other cases, the prompt introduction of new service to the public is of overriding importance to the Commission, then any further consideration of Benchmark's application would clearly be contrary to the public interest. Benchmark's existing track record before the Commission is flawed enough; neither the Commission, nor Hap-Hazard, nor -- most importantly -- the public in Chatom should be subjected to further delay at the hands of Benchmark. Benchmark's application should be summarily dismissed or denied.

Respectfully submitted,


/s/ Harry F. Cole
Harry F. Cole

Bechtel & Cole, Chartered
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Washington, D.C. 20036
(202) 833-4190

Counsel for Charles Esposito d/b/a
Hap-Hazard Broadcasting

April 11, 1991

ATTACHMENT A

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

JAN 19 1989

IN REPLY REFER TO:

8920-MW

Benchmark Communications Corporation
4700 Southwest 75th Avenue
Miami, Florida 33155

In re: WCCJ(FM), Chatom, Alabama
File No. BMPH-880325JC

Dear Applicant:

This letter is in response to: (i) your application for extension of time to construct station WCCJ(FM), Chatom, Alabama; (ii) the petition to deny that application, filed on May 6, 1988 by Alabama Native American Broadcasting Company ("Native"); and (iii) related pleadings.¹

Initially, we must point out that a petition to deny does not lie against an extension application. See 47 U.S.C. § 309(d)(1); 47 C.F.R. § 73.3584(a). Accordingly, we will treat Native's petition to deny as an informal objection pursuant to 47 C.F.R. § 73.3587.

Background. The original construction permit for a new FM station on Channel 276A in Chatom, Alabama (BPH-8404231L) was granted to June G. Fuss on October 23, 1984, specifying a construction completion date of October 23, 1985. On June 17, 1985, the Commission granted the application (BAPH-850215HK) to assign the permit of the station WDAL(FM) from Ms. Fuss to Benchmark. Benchmark received its first extension of construction permit (BMPH-350924JR) on November 18, 1985, to expire on May 18, 1986. On April 11, 1986, Benchmark filed a counterproposal in a pending Commission rulemaking proceeding requesting that its channel be upgraded from the current class A to Class C facilities. See MM Docket 86-55, RM 5400. On October 6, 1987, Benchmark received its second extension (BMPH-860417JG), through April 6, 1988, based on the pending rulemaking proceeding. Finally, on March 25, 1988, Benchmark filed the instant extension application.²

In the March 25 filing, Benchmark requests a third extension based upon the following considerations: that (i) "approximately ninety five percent of

1 These related pleadings include: (i) your "Waiver to 1.45(a) Objections," filed on June 27, 1988; (ii) your opposition to the petition, filed on July 5, 1988; (iii) Native's reply, filed on July 8, 1988; (iv) Native's supplement to its reply, filed on July 12, 1988; (v) your "amendment" to the extension application, filed on July 13, 1988; (vi) the Commission's letter of inquiry (reference 8920-SL), dated July 20, 1988; (vii) your response to that letter, dated August 8, 1988; and (viii) your comments, telefaxed to the Commission on December 20, 1988.

2 This application was originally granted on May 31, 1988, without knowledge of Native's informal objection. The grant was rescinded on June 11, 1988.

the equipment is on hand to complete the construction of the station";³ (ii) construction was commenced on January 20, 1988 and continued through the filing date, including "excavation of the site for the tower foundation"; (iii) anchors and tie down points for the mobile home which was to house the station's studios and offices were completed by the first week in February, 1988; (iv) the mobile home was brought to the site, and equipment was "being installed"; (v) the tower was delivered to the site on March 1, with erection to commence on March 23; and (vi) the local power company had begun installing a service line to the site which "should be completed by the end of March."

In its objection, Native took issue with these representations, claiming that: (i) "despite an intensive search" no evidence of the construction site, excavation, trailer, or tower could be found. Native also submitted aerial photographs by Mr. R. Dale Gehman which allegedly "reveal only densely-forested land." In its opposition, Benchmark indicates that Mr. Gehman had photographed the wrong site, with the correct site being "approximately seven tenths" of a mile from the spot photographed by Mr. Gehman, in a "natural clearing" and that site preparation "has been limited to positioning a trailer/tower near the tower base location and digging several holes for the foundation for the tower base." Benchmark in its opposition admitted that the tower was not in position. In reply, Native reaffirmed that it had in fact photographed the correct location and, upon revisiting the site in question, discerned: (i) four small wooden pegs in the ground; and (ii) that allegedly, sometime in June of 1988, a trailer had been delivered to the site.

Taking note of the apparent discrepancies between statements in the original filing, the objection by Native, and Benchmark's own response, the Commission wrote Benchmark, requesting specific information regarding the status of construction at the time of filing. Based upon Benchmark's August 8, response, the following appears to be the extent of such construction; (i) the "construction" mentioned in the March 25 application as having commenced on January 21 consisted of the excavation of a two-by-six-foot hole near the tower site, which was filled with concrete. This apparently was to be the "foundation for the tower base" and the "concrete cap"; (ii) four wooden pegs were driven into the ground to mark where the tower anchors were to be placed; (iii) the original mobile home, which Benchmark President Raymond Meyers agreed to buy on January 21 only if the seller would deliver it to the site, was destroyed before arrival; (iv) a second trailer was brought to the site on May 16, 1988; (v) "WCCJ(FM) now possesses all equipment necessary to begin broadcasting," which indicates various studio equipment, a transmitter, a 270-foot Rohn 556 tower with accessories, and an antenna;⁴ (vi) the original

3 All that remained were a power divider for the antenna, an exciter for the transmitter, and a transmission line. "All other items" were said to be "on hand" and "in various states of installation."

4 Benchmark states that "most of their equipment was acquired over several years not specifically for WCCJ." Mr. Meyers buys, sells, and deals broadcast equipment.

tower, which was to be delivered on March 8, was allegedly the wrong tower and acceptance was refused on March 21, 1988;⁵ (vii) a new tower was located and contracted for on May 19th and is currently being held in Miami; (viii) the transmitter remains in Miami as well, awaiting repair and replacement of several apparently rare "4-400 final tubes"; and (ix) an agreement for a utility easement over the land traversed by the power company was reached on July 27, 1988, without which the power company would not write a "service order" to bring power to the site.⁶ No power lines have yet been laid.

Discussion. The Commission expects rapid completion of construction and grants applications for extensions or replacements only when there is substantial evidence that concrete steps are being taken to complete construction promptly or that the permittee has taken all possible steps to proceed with construction.

In its Memorandum Opinion and Order In re Amendment of Section 73.3598, and associated Rules concerning the Construction of Broadcast Stations, 102 FCC 2d 1054 (1985), the Commission established strict standards for the grant of extensions of time to construct broadcast facilities. Such extensions will be granted only if one of the following criteria has been met:

1. Construction is complete and program testing is underway looking toward prompt filing of a license application.
2. Substantial progress has been made, i.e., demonstration that equipment is on order or on hand, site cleared, and construction proceeding toward completion.
3. No progress has been made for reasons clearly beyond the control of the permittee (such as delays caused by governmental budgetary processes and zoning problems) but the permittee has taken all possible steps to resolve the problem expeditiously and proceed with construction.

See also 47 C.F.R. § 73.3534(b).

Of these three factors, clearly the first and third do not apply: construction is not complete, and Benchmark made no argument that circumstances beyond its control caused construction delay. Additionally, it is clear that, at the time of filing the March 23 extension application, the only construction which had been undertaken at the site was the excavation of

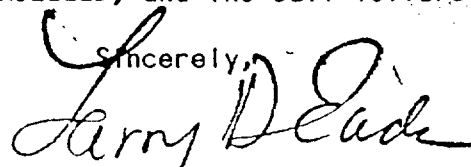
5 We must point out that Exhibit IV to the August 8 response indicates in paragraph 3 that "the original tower was never delivered" (emphasis supplied).

6 The agreement states that the easement "is ready for mailing. . . as soon as you have attached your check for \$650.00." There is no indication that such fee has been paid.

a two-foot-by-six-foot hole and the placement of four wooden anchor markers. This hardly constitutes "substantial progress." Neither is the fact that Benchmark has acquired, albeit not specifically for WCCJ(FM), substantial broadcast equipment apparently after the filing of the application of any use. A permittee is not entitled to a grant on the basis of a second effort when it literally did nothing prior to the expiration of its time to construct. See Letter to Rev. James & Vaughan, DA 87-515 (released May 5, 1987 by the Chief, Video Services Division), citing Sunrise Broadcasting, Inc., 100 FCC 2d 1565 (MMB 1985), app. for review granted another ground sub nom., Letter to Susan K. Ludka, 8940-MLB (January 13, 1986). The record here indicates literally no progress prior to the expiration of the construction permit on April 6, 1988. The extension request must therefore be denied.

We must also point out, however, that there appear to be several misrepresentations with respect to construction progress made by Benchmark in this case. Specifically, while Benchmark claimed in its March 25 application that tower and mobile home to be used for studios and offices were on site with equipment installation progressing, these statements appear to be untrue. There is still no tower at the site, and no trailer arrived at least until (by Benchmark's own admission) May 16, 1988. Additionally, Benchmark claimed that the power company had begun installing a service line to the site, when no such line is in place yet, over nine months after the claim was made. We remind Benchmark that truthfulness is a key element of character necessary to operate a broadcast station in the public interest. See In the Matter of Policy Regarding Character Qualifications in Broadcast Licensing, 102 FCC 2d 1179 (1986); recon. granted in part, 1 FCC Rcd 421 (1986). See also FCC v. WOKO, 329 U.S. 223 (1946), and Leflore Broadcasting Company, Inc. v. FCC, 636 F.2d 454 (D.C. Cir. 1980). However, given the denial of the subject extension application and consequent cancellation of the WCCJ(FM) construction permit, we do not believe that further action is warranted at this time.

Accordingly, the application of Benchmark Communications Corporation (BMPH-880325JC) for extension of time to construct the facilities of station WCCJ(FM) IS DENIED, the underlying construction permit (BPH-840423ID, as modified) IS FORFEITED AND CANCELLED, and the call letters ARE DELETED.

Sincerely,

Larry D. Eads, Chief
Audio Services Division
Mass Media Bureau

cc: Alabama Native American Broadcasting Company

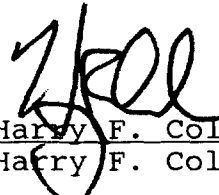
CERTIFICATE OF SERVICE

I, Harry F. Cole, hereby certify that, on this 11th day of April, 1991, I caused to be placed in the U.S. mail, first class postage prepaid, copies of the foregoing "Petition to Deny" addressed to the following:

Larry Eads, Chief (By Hand)
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/s/ Harry F. Cole
Harry F. Cole